Editor's note: 93 I.D. 6

MARATHON OIL CO.

IBLA 85-783 Decided January 30, 1986

Appeal from a decision of the Acting Director, Minerals Management Service, denying a request for suspension of an order demanding payment of late payment charges on additional royalties assessed on oil and gas lease OCS-G 2234, pending administrative review of the assessment.

Reversed.

1. Administrative Procedure: Generally -- Federal Oil and Gas Royalty Management Act of 1982: Generally -- Oil and Gas Leases: Royalties -- Rules of Practice: Appeals: Effect of

The regulation at 30 CFR 243.2 provides that decisions regarding payment of additional royalties are not suspended by the filing of an appeal therefrom, but authorizes the Director, Minerals Management Service, to stay the decision upon a finding that a suspension will not be detrimental to the lessor and upon submission of a bond deemed adequate to indemnify the lessor from loss or damage. A decision denying a stay pending resolution of a timely filed appeal may be reversed in the absence of a reasoned finding that the stay would be detrimental to the lessor where the appeal raises a bona fide legal issue, lessee is faced with the threat of irreparable injury if the stay is not granted, it appears the threatened injury to the lessee outweighs any potential harm the stay may cause the lessor, and it does not appear from the record that a stay is contrary to the public interest.

APPEARANCES: Hugh V. Schaefer, Esq., and George H. Rothschild, Jr., Esq., Findlay, Ohio, and Patricia L. Brown, Esq., Washington, D.C., for Marathon Oil Company; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Bruce W. Dannemeyer, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Marathon Oil Company (Marathon) has appealed from a decision of the Acting Director of the Minerals Management Service (MMS), dated July 3, 1985, denying its request to suspend an order demanding payment of late payment charges on additional royalties assessed by a previous order for oil and gas lease OCS-G 2234. Both the order assessing additional royalties and the order assessing late payment charges based thereon are the subject of administrative appeals currently pending before MMS. Marathon is seeking to stay the requirement to pay the late charges pending resolution of the appeal of the royalty assessment.

On April 3, 1985, the Manager of the Tulsa, Oklahoma, Regional Compliance Office, MMS, issued an order directing Marathon to pay the sum of $ 2,914.36 in royalties on monies it had received from a purchaser of condensate produced from its oil and gas lease. The April 3, 1985, decision informed Marathon that the regulation at 30 CFR 206.150 requires that the value of production for royalty purposes be not less than "the gross proceeds accruing to the lessee from the produced substances or less than the value computed on the reasonable unit value established by the Secretary. Accordingly,

that regulation, in the view of MMS, requires royalty payments on transportation and separation cost reimbursements received by Marathon from the purchasers of condensate production. On May 3, 1985, Marathon filed an appeal of the April 3, 1985, order that it pay such additional royalties, arguing it does not retain these monies, but, instead, pays them to an independent, unaffiliated third party to cover the costs of transporting the condensate. Marathon's position on appeal to the Director, MMS, is that these monies are an allowable, out-of-pocket transportation cost which should be credited by the regional manager in calculating royalty payments. Nevertheless, Marathon paid the $ 2,914.36 under protest, subject to its appeal.

On May 28, 1985, the Tulsa Regional Manager issued a second order, demanding that Marathon pay late payment charges in the amount of $ 2,558.20 on the additional royalties billed on April 3, 1985. 1/ Subsequently, on June 27, 1985, Marathon filed a second notice of appeal with the Director, MMS, appealing the demand of late payment charges. In this appeal, Marathon requested the order to pay the late charges be stayed pending resolution of the appeal upon the posting of a bond to indemnify the United States, pursuant to 30 CFR 243.2.

The Acting Director, MMS, advised Marathon by letter dated July 3, 1985, that he was denying Marathon's request to post bond in lieu of making

1/ Late payment charges were assessed from the date on which the payment was due until the date on which payment was received, citing the regulation at 30 CFR 218.102. Although that regulation pertains to onshore oil and gas leases, a similar provision relating to offshore oil and gas leases is found at 30 CFR 218.150. Appellant's liability for the late charges assessed is contingent on the outcome of the appeal regarding the additional royalty assessment.

payment of the late payment charges. Subsequently, Marathon filed an appeal with this Board, challenging the Acting Director's July 3, 1985, letter denying its request to post bond. Thus, the scope of this appeal presently before the Board is limited to the propriety of the decision refusing to stay the order to pay the late charges pending resolution of the appeal of those charges. 2/

At issue in this appeal is the application of the regulation promulgated at 30 CFR 243.2 (49 FR 37353 (Sept. 21, 1984)). As observed by the Board in its August 5, 1985, order, Marathon's appeal is the first to be reviewed by the Board involving the new "pay-pending-appeal" provision, 30 CFR 243.2, and as such, it presents issues of first impression concerning its proper interpretation and application. That regulation provides as follows:

> Compliance with any orders or decisions, issued by the Royalty Management Program after August 12, 1983, including payments of additional royalty, rents, bonuses, penalties or other

2/ By letter dated July 26, 1985, MMS threatened a series of punitive actions against Marathon for failure to pay the $ 2,558.20 in late payment charges, including assessment of a penalty for failure to make late payment charges, reporting the delinquency to a credit bureau, shutting in wells, or cancelling affected leases. Marathon sent a copy of the July 26, 1985, letter to the Board on July 30, 1985, renewing its request for an "immediate stay of MMS' order denying bond, pending full review by this Board."

On Aug. 5, 1985, this Board issued an order temporarily suspending the effect of MMS' order of May 28, 1985, demanding that Marathon pay late payment charges in the amount of $ 2,558.20, and vacating the decision of the Acting Director, MMS, dated July 3, 1985, denying Marathon's request to suspend payment of late payment charges. The stay order provided it would remain effective pending resolution of this appeal from denial of the request to post bond in lieu of payment pending appeal. The order was expressly conditioned upon appellant's provision of a bond to MMS in an acceptable form sufficient to cover amounts that may accrue while the appeals are pending.

> assessments, shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, MMS * * * and then only upon a determination, at the discretion of the Director * * *, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

The Acting Director of MMS, in his July 3, 1985, letter rejecting Marathon's request that it be allowed to post a bond rather than pay the late payment charges, explained that the suspension of compliance with any order or decision would be the exception rather than the general rule. The letter noted that the preamble to 30 CFR 243.2 "stated very clearly that the purpose of the regulation is to continue the longstanding practice that compliance with MMS orders is not suspended by reason of an appeal being taken." Quoting from the Federal Register notice of rulemaking, the letter stated that MMS gave notice in the preamble that although the regulation permits suspensions at the discretion of the Director: "In almost all instances MMS will not grant suspensions, since the effectiveness of MMS's royalty collection efforts is premised on compliance with orders during appeal. Only in the unusual circumstance will MMS grant suspension pending the appeal process." 49 FR 37336, 37344 (Sept. 21, 1984).

The Acting Director, MMS, proceeded to define what is meant by the term "unusual circumstance" in his letter rejecting Marathon's request for a suspension:

> Consequently, I will not grant suspensions unless the recipient of the orders demonstrates an unusual circumstance such as a significant material factual oversight by the MMS office issuing the order, or some other obvious gross error or defect in the

> order. I also have granted suspension pending appeal where the determination upon which the order is based is a legal issue under review by the Office of the Solicitor, and my decision on the appeal must await the outcome of that review.

The Acting Director further stated that Marathon had failed to identify any unusual circumstance justifying suspension of MMS' order dated May 28, 1985, and accordingly rejected Marathon's request to post a bond in lieu of payment pending resolution of the appeal.

Marathon contends the standards articulated by MMS in rejecting its request for suspension are inconsistent with the terms of 30 CFR 243.2. Marathon concedes 30 CFR 243.2 establishes a "general rule" that a lessee cannot suspend the effectiveness of an order merely by appealing it, but emphasizes that a suspension may be granted in certain instances under the regulations (Reply at 6). To obtain a suspension, the lessee must not only file a timely appeal, but obtain written authorization for the suspension from the Director of MMS. Marathon contends the regulation requires that the suspension be granted once an adequate bond is submitted unless it is determined that the suspension will be "detrimental" to the Department. Marathon objects to the "two possible sets of 'extraordinary facts'", quoted above, under which MMS states it will grant suspension of an order or decision, characterizing those standards as arbitrary and absolutely inconsistent with the agency's published regulation: "In other words, a suspension may be granted only if MMS deigns to send the underlying legal issue in controversy to the Solicitor for review or if, in a preliminary proceeding, the lessee can prove to MMS that its order is invalid on its face and therefore unenforceable anyway" (Reply at 8).

Counsel for MMS asserts the regulation mandates a two-step process in determining whether a suspension will be granted. First, there must be a finding that the "extraordinary facts of the case" merit a deviation from the ordinary pay-pending-appeal requirements. Second, if the first test is met, there must be a finding that suspension will not be detrimental to the lessor upon the posting of an acceptable bond (Answer at 3). MMS asserts the issue is whether the Director abused his discretion in not finding such unusual circumstances as would justify an exception to the rule.

[1] When a determination is left to the discretion of an agency, the general rule is that a decision made in the exercise of that discretion should be upheld unless it is arbitrary and capricious. Further, a decision is arbitrary and capricious when it is made on a basis other than the standard articulated in the authorizing statute or the implementing regulation. Eudey v. Central Intelligence Agency, 478 F. Supp. 1175, 1177 (D.D.C. 1979); see Motor Vehicle Manufacturers Association v. State Farm Mutual, 463 U.S. 29, 43 (1983); Frisby v. U.S. Department of Housing & Urban Development, 755 F.2d 1052, 1055 (3rd Cir. 1985). Our review of the decision of the Acting Director in exercising his discretion whether to grant or deny a stay under 30 CFR 243.2 must be performed with reference to the content of that regulation. Again, that regulation provides that the Director may authorize in writing a suspension of an order or decision "upon a determination, at the discretion of the Director * * *, that such suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage." 30 CFR 243.2. Thus, the crucial issue, assuming that an acceptable bond (adequate

to indemnify the lessor from loss or damage) is tendered, is whether the grant of a suspension will be detrimental to the lessor.

As pointed out by counsel for MMS, Departmental regulations governing both onshore and offshore oil and gas operations have long provided that decisions of MMS and its predecessor, the Conservation Division of the Geological Survey, are not suspended by the filing of an appeal in the absence of an order staying the decision. This is consistent with the recognition that many of the decisions regarding oil and gas lease operations would be rendered ineffective with irrevocable consequences (e.g., waste of otherwise recoverable resources) if implementation were forced to await conclusion of the administrative review process. However, this rationale does not apply to the newly promulgated regulation at 30 CFR 243.2 (the pay-pending-appeal regulation) applying this provision to orders regarding payment of royalty on past production. 3/ Since the issue is the liability for a certain dollar amount of royalty, there is little apparent reason why provision of an adequate bond may not be sufficient to protect the interest of the lessor.

The statement in the preamble to the rulemaking, quoted by the Acting Director in his decision, that the effectiveness of royalty collection efforts is premised on compliance with orders during appeal, offers no

3/ Although the prior regulation would apparently have been applicable to royalty determinations, see 30 CFR 221.66 (1982), it appears that, in the past, payments of disputed royalty amounts were suspended pending resolution of administrative and judicial appeals. See Atlantic Richfield Co., 21 IBLA 98, 103, 82 I.D. 316, 323 (1975).

further guidance in determining when suspension of payment will not be detrimental to the lessor. Both statutory provisions of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), P.L. 97-451, 96 Stat. 2448 (1983), and the implementing regulations authorize collection of interest on late payments. 30 U.S.C. § 1721 (1982); 30 CFR 218.102 (onshore), 218.150 (offshore). Similarly, the absence of the unusual circumstances cited in the decision of the Acting Director (i.e., decision based on an obvious mistake of fact or on a legal issue under review by the Departmental Solicitor) does not establish whether suspension would be detrimental to the lessor in this case. If the policy is that no decision will be suspended pending appeal unless appellant shows obvious error of fact (which would render the decision arbitrary and capricious) or that the issue is currently under review by the Departmental Solicitor, then the regulation should be amended to so provide. As the regulation is written, the standard is whether the suspension will be detrimental to the lessor. The decision under appeal rejects the application, but gives no explanation why a bond in the amount of the disputed obligation is not sufficient to protect the interest of the lessor.

Counsel for MMS contends mere disagreement of appellant with the decision reached by MMS in the exercise of its discretion and judgment in denying the stay is not sufficient to justify changing the decision on appeal. Counsel noted the Board will not substitute its judgment for that of the delegated decisionmaker (MMS in this case) and the decision will ordinarily be affirmed in the absence of the showing of compelling reasons for modification or reversal, citing Richard J. Leaumont, 54 IBLA 242, 88 I.D. 490 (1981); Rosita Trujillo, 21 IBLA 289 (1975). However, this line of cases is

distinguishable. Unlike Leaumont and Trujillo and many other cases where appellants have alleged an error in judgment in applying standards to reach a decision, appellant herein is alleging a failure to apply the regulatory standard. It is well established that the Department is bound by its regulations and a decision must be based on the criteria stated therein. United States v. Nixon, 418 U.S. 683, 696 (1974); Frisby v. U.S. Department of Housing & Urban Development, supra at 1055-1056.

In the absence of any criteria in the regulation as to when suspension will be detrimental to the lessor or a finding below stating reasons why granting appellant's request will be detrimental to the lessor, we believe the decision of the court in Placid Oil Co. v. United States Department of the Interior, 491 F. Supp. 895 (N.D. Texas 1980), offers relevant considerations in adjudicating a stay request. In Placid, the plaintiff/lessee of an Outer Continental Shelf oil and gas lease was ordered to recalculate its royalty obligation and pay the additional amount due based on a revised interpretation by the Department of the Interior of the definition of oil and gas on which royalty was payable. The new definition included vented and flared gas which had previously been excluded. Placid Oil sought to enjoin collection of the additional royalties pending resolution of the obligation to pay.

In order to grant the motion to stay payment of the royalty, the court required four factors: substantial likelihood of success on the merits; substantial threat of irreparable injury to the moving party if the stay is not granted; the threatened injury to the moving party must outweigh the

potential harm the stay may do to the nonmoving party; and the stay must not be contrary to the public interest. 491 F. Supp. at 904; see Sun Oil Co., 42 IBLA 254, 257-58 (1979). Balancing the probability of movant's success on the merits with the potential consequences of an injunction on the rights of the parties, the court quoted the opinion in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), which explained:

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.

Regarding the threat of irreparable injury, the Placid court held that if movant were to "go through the process and pay the royalties and then prevail on the merits of the lawsuit, it would be due a refund of the money actually given Interior, but it could not recover interest on the money, nor could it get compensated for the costs of compliance." 4/ 491 F. Supp. at 905. In light of this lost interest, as well as the other cost, the court found the lessee was threatened with irreparable injury. Id. at 905-907.

The threat of lost interest has also been held to be a threat of irreparable harm justifying an injunction in the case of a civil penalty assessed

4/ Compliance in the Placid case required the lessee to spend approximately 1,000 man hours of time calculating the additional royalty due under the order on the vented and flared gas, a factor not involved in the present case where MMS calculated the additional royalty due.

under section 24(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1350(b) (1982). Conoco, Inc. v. Watt, 559 F. Supp. 627 (E.D. La. 1982). After noting that even if Conoco prevailed on the merits and the civil penalties were refunded, no interest would be paid by the Department on the funds, the court held that "[e]quity demands that the Court take such measures as will avoid the imposition of irreparable harm * * * especially where plaintiff's interest in escrowing funds with the court would also adequately protect defendant's interest." Id. at 630 (citations omitted).

Applying these factors to the present case, it is clear that appellant, like the lessees in Placid and Conoco, is threatened with the irreparable injury of lost interest on the funds ordered to be paid since there is no authority for payment of interest to the lessee on any royalty payments ultimately determined to constitute an overpayment. With respect to the potential harm to the adverse party, MMS in this context, and the effect on the public interest, there is no reason apparent from the record in this case why an adequate indemnity bond will not suffice to protect the interest of the United States in guaranteeing payment. 5/ Further, as previously noted, there is statutory authority for charging interest on royalty payments made after they are due. See 30 U.S.C. § 1721 (1982); 30 CFR 218.150.

Although we are mindful of the statutory policy of FOGRMA to "ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States," 30 U.S.C. § 1701(b)(3) (1982), we note the

5/ We do not hold that there may be no case where an indemnity bond is inadequate to protect the public interest, but rather that such a showing has not been made on the record here.

issue here is what is owed, i.e., whether royalties are payable on transportation and separation cost reimbursements. It has not been argued by MMS that this issue is not bona fide. Further, we are bound to take note that under the Administrative Procedure Act, 5 U.S.C. § 704 (1982), and Departmental regulations, 43 CFR 4.21, the failure to stay the order requiring payment makes it a final Departmental decision subject to immediate judicial review. See Conoco, Inc. v. Watt, supra at 629. We do not believe the public interest is generally served by short-circuiting the administrative review process within the Department and making the initial decision the final Departmental decision for purposes of judicial review.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

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C. Randall Grant, Jr.
Administrative Judge

We concur:

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James L. Burski
Administrative Judge

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Will A. Irwin
Administrative Judge